Nicole Guzman
Chief Counsel

Danielle M. Sigmund
Deputy Chief Counsel

Joey L. Caccarozzo
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
6431 S. Country Club Road
Tucson, AZ 85706
(520) 295-4167

NON-DETAINED

RECEIVED
DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
2019 JUL 17 AM 8:33
BOARD OF
IMMIGRATION APPEALS
OFFICE OF THE CLERK

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:	
German Berudez-Cota In removal proceedings	A(b)(6) [redacted]

DEPARTMENT OF HOMELAND SECURITY'S
OPPOSITION TO RESPONDENT'S MOTION TO TERMINATE

TABLE OF CONTENTS

2019 JUL 17 AM 8:33
OFFICE OF THE CLERK

INTRODUCTION

The respondent has filed a motion asking the Board of Immigration Appeals (the Board) to terminate removal proceedings by relying on *Pereira v. Sessions*, No. 17-459, --- S. Ct. ---, 2018 WL 3058276 (U.S. June 21, 2018), to find that the respondent was not properly in proceedings due to a "defective" Notice to Appear (NTA). *Pereira* never once refers to termination and nowhere purports to invalidate the underlying removal proceedings. The question presented and answered by the Court in *Pereira* is "[w]hether, to trigger the stop-time rule by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" Petition for Writ of Certiorari, *Pereira*, 2017 WL 4326325 (No. 17-459). Counsel argues for an overbroad and unsupported expansion of *Pereira* which ignores the Supreme Court's clear and unmistakable language and is impossible to square with the holding of *Pereira*. A holding on the application of the stop-time rule only has effect *in removal proceedings*.

The practical effect of misreading *Pereira* to terminate proceedings is breathtaking. In the weeks following *Pereira*, this issue is arising in hundreds of cases. This appeal warrants review by a three-member panel to settle inconsistencies among the rulings of different Immigration Judges, and to issue a precedent to resolve a controversy of national import. *See* 8 C.F.R. § 1003.1(e)(6)(i), (ii), (iii) & (iv).

ISSUE PRESENTED

> Whether the Board is obligated to terminate proceedings under *Pereira,* where the Immigration Court provided the respondent with notice of the time and place of the hearing, as required by INA § 239(a)(1)(G), and the respondent received notice of all the matters set forth in INA § 239(a)(1).

STANDARD OF REVIEW

Motion to terminate presents a pure question of law that the Board decides de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

SUMMARY OF THE ARGUMENT

The respondent's motion for termination is an erroneous application of the law. *Pereira* never once refers to termination and nowhere purports to invalidate the underlying removal proceedings. The "narrow question" presented and resolved by the Court in *Pereira* is "[i]f the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, *does it trigger the stop-time rule*?" *Pereira*, 2018 WL 3058276 at *3 (emphasis added); *accord id.* at *7, *11. The respondent's misreading of *Pereira* cannot be squared with either the text of the Court's decision or the Court's holding. Pereira, like the respondent here, received a NTA that did not specify the date and time of proceedings. The Court's holding about the stop-time rule has meaning for Pereira *because* he is in removal proceedings and wished to seek cancellation of removal under INA § 240A(b). That is not the case here.

The reading of Pereira further fails because the Notice of Hearing that the Immigration Court served on the respondent satisfies the statutory requirement at INA § 239(a)(1)(G) that the respondent receive notice of the time and place of hearing. *Pereira* makes clear that it is the substance of the notice, not its label, that controls. 2018 WL 3058276 at *10. It is the responsibility of the Immigration Court to schedule hearings and provide the parties with notice of the time, place and date of hearings, including the initial hearing when that information is not contained in the NTA. 8 C.F.R. § 1003.18(a)-(b). The Immigration Court fulfilled that responsibility in this case, and the Immigration Judge lacks authority to treat a Department of

Justice regulation as a nullity. As a matter of controlling circuit law, a "Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of hearing is in fact later sent to that alien." *Popa v. Holder*, 571 F.3d 890, 898 (9th Cir. 2009).

This Opposition to Respondent's Motion to Terminate is filed in response to the respondent's Motion to Terminate recently filed with the Board. This filing is not intended as a comprehensive response to any other issues which the respondent raised on appeal.

STATEMENT OF FACTS

On August 28, 2013, the Department served a NTA on the respondent. Exh. 1. It did not contain the date and time of hearing. *Id.* The Department filed the NTA with the Immigration Court in Tucson, Arizona. The Immigration Court in Tucson, Arizona issued a notice of hearing containing the date, time and place of the initial master calendar hearing and served it on both parties. *See generally* 8 C.F.R. § 1003.18(b). The initial master calendar hearing took place on May 13, 2014 and the respondent was present. Tr. at 1-10. Subsequent hearings occurred on May 26, 2015, January 2, 2016, January 10, 2017, June 6, 2017, and October 3, 2017, and the respondent was present at each of those hearings. Tr. at 11-31.

On October 3, 2017, the Immigration issued an oral decision denying the respondent's motion for continuance and in the alternative, administrative closure. I.J. at 4. The Immigration Judge granted the respondent the privilege of voluntarily departing the United States by December 4, 2017. *Id.* The respondent filed a timely appeal and a briefing schedule has been issued. On July 3, 2018, the respondent filed the instant Motion to Terminate.[1] The following brief in opposition outlines the Department's position on the Motion to Terminate.

[1] The Department received the motion on July 10, 2018.

ARGUMENT

I. *Pereira v. Sessions* is a Decision About the Stop-Time Rule Applicable to Cancellation of Removal and Provides No Lawful Basis for Terminating Proceedings.

Pereira v. Sessions provides no support for the Board to terminate proceedings in this matter. The question presented in *Pereira* is "[w]hether, *to trigger the stop-time rule* by serving a 'notice to appear,' the government must 'specify' the items listed in the definition of a 'notice to appear,' including '[t]he time and place at which the proceedings will be held.'" Petition for Writ of Certiorari, *Pereira*, 2017 WL 4326325 (No. 17-459) (emphasis added).[2] As *Pereira* itself makes clear, "[t]he Court granted certiorari in this case, . . . , to resolve division among the Courts of Appeals on a simple, but important, question of statutory interpretation: Does service of a document styled as a 'notice to appear' that fails to specify 'the items listed' in § 1229(a)(1) *trigger the stop-time rule*?" *Pereira*, 2018 WL 3058276 at *7 (internal citation omitted) (emphasis added). This is a "narrow question." *Id.* at *3. Accordingly, the Supreme Court framed the issue as follows: "If the Government serves a noncitizen with a document that is labeled 'notice to appear,' but the document fails to specify either the time or place of the removal proceedings, *does it trigger the stop-time rule*?" *Id.* (emphasis added). Later, the Court again specifies that "the dispositive question in this case is much narrower, but no less vital: Does a 'notice to appear' that does not specify the 'time and place at which the proceedings will be held,' as required by § 1229(a)(1)(G)(i), *trigger the stop-time rule*?" *Id.* at *7 (emphasis added).

The Supreme Court holds that the answer to this question is no. "A notice that does not inform a noncitizen when and where to appear for removal proceedings is not a 'notice to appear

[2] The question presented is also available on the Supreme Court's website at https://www.supremecourt.gov/qp/17-00459qp.pdf.

under section 1229(a)' and therefore *does not trigger the stop-time rule*." *Id.* at *3 (emphasis added) (quoting INA § 240A(d)(1)); *accord id.* at *7 ("A putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a),' and so *does not trigger the stop-time rule*." (quoting INA § 240A(d)(1)) (emphasis added)); *id.* at *11 ("A document that fails to include such information is not a 'notice to appear under section 1229(a)' and thus *does not trigger the stop-time rule*." (quoting INA § 240A(d)(1)) (emphasis added)). The Supreme Court's constant use of the same phrase—trigger the stop-time rule—cannot be accidental, and it leaves no doubt that *Pereira* is about what triggers the stop-time rule. *Cf. Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016) ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same. . . .").

The stop-time rule is part of section 240A of the Immigration and Nationality Act (INA or Act) and provides that "[f]or purposes *of this section*, any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 239(a)" of the Act.[3] INA § 240A(d)(1) (emphasis added). "[T]his section," i.e., section 240A of the Act, authorizes cancellation of removal, a form of relief aliens may seek in removal proceedings. The question resolved by the Court—i.e., what triggers the stop-time rule—only matters when an alien is in removal proceedings and seeking cancellation of removal. The resolution of this question matters in Pereira's case because he sought to apply for cancellation of removal in his reopened removal proceedings. *Pereira*, 2018 WL 3058276 at *6. This question, however, would be moot if the NTA in his case, which "ordered him to appear before an Immigration Judge in Boston 'on a date to be set at a time to be set[,]'" *id.*, was

[3] Service of a NTA is not the only event that stops time under INA § 240A(d)(1), and there is an exception to the stop-time rule for aliens who seek special rule cancellation under INA § 240A(b)(2)(A).

inadequate for proceedings to occur even after the Immigration Court served him a notice of hearing setting a date and time for the hearing.

The Supreme Court does not give advisory opinions, expressing what the law would be upon a hypothetical state of facts. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013); *see Thomas v. Anchorage Equal Rights Comm'n.* 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("Our role is neither to issue advisory opinions nor to declare rights in hypothetical cases . . . ."). The prohibition on advisory opinions has been described as "'the oldest and most consistent thread in the federal law of justiciability[.]'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). The "stop-time" ruling the Court rendered in *Pereira* was not an advisory opinion *because* the respondent is in removal proceedings and seeking relief. If the Court had perceived that Pereira might not be properly in proceedings, rendering his application for cancellation of removal and the application of the stop-time rule moot, it would have directly addressed the issue. *See, e.g., North Carolina v. Rice*, 404 U.S. 244 (1971) (declining to reach the underlying question without first resolving the "threshold question" of mootness). That the Court said absolutely nothing about the termination of proceedings reflects that there was nothing to say. *See United States v. Lopez*, 518 U.S. 790, 798 (10th Cir. 2008) (Gorsuch, J.) (recognizing the "logical significance of the dog that didn't bark").[4]

II. The Initial Notice of Hearing Served by the Immigration Court on the Respondent Satisfies INA § 239(a)(1)(G) and in Conjunction with the NTA Provided the Written Notice Required by § 239(a)(1) and *Pereira*.

Under the Supreme Court's analysis in *Pereira*, what qualifies as a NTA is a matter of substance, not form. "If the three words 'notice to appear' mean anything in this context, they

[4] A Sherlock Holmes mystery illuminated the significance of the dog that didn't bark. *See id.* at n.2 (citing Sir Arthur Conan Doyle, *Silver Blaze*, *in* The Memoirs of Sherlock Holmes (1894)).

must mean that, at a minimum, the Government has to provide noncitizens 'notice' of the information, *i.e.*, the 'time' and 'place,' that would enable them 'to appear' at the removal hearing in the first place. Conveying such time-and-place information to a noncitizen is an essential function of a notice to appear, for without it, the Government cannot reasonably expect the noncitizen to appear for his removal proceedings." *Pereira*, 2018 WL 3058276 at *9. INA section 239(a)(1) requires "written notice." "Notice" means "legal notification." Black's Law Dictionary, 1090 (8th ed. 2004). It is not defined as or limited to a single sheet of paper. *See id.* "The fact that the government fulfilled its obligations under INA § 239(a) in two documents—rather than one—did not deprive the IJ of jurisdiction to initiate removal proceedings." *Dababneh v. Gonzales*, 471 F.3d 806, 809 (7th Cir. 2006). The second document, the "Notice of Hearing[,] perfected the notice required by § 239(a)(1)[.]" *Guamanrrigra v. Holder*, 670 F.3d 404, 410 (2d Cir. 2012); *see Pereira*, 2018 WL 3058276 at *14 (Kennedy, J., concurring) (citing *Dababneh* and *Guamanrrigra* with approval for the proposition that the stop-time rule is triggered when the written notice required by INA § 239(a)(1) is "perfected").

Likewise, the INA does not require a document labelled as a NTA. Rather, it uses the term "notice to appear" as a shorthand way of referring to the "written notice" that conveys the information required by INA § 239(a)(1). *See Pereira*, 2018 WL 3058276 at *10. "The INA simply requires that an alien be provided written notice of his hearing; it does not require that the NTA . . . satisfy all of § 1229(a)(1)'s notice requirements." *Haider v. Gonzales*, 438 F.3d 902, 907 (8th Cir. 2006). For example, in *Pereira* the Court observed that an Order to Show Cause (OSC) that specifies the time and place of proceedings may qualify as a "notice to appear" for purposes of the stop-time rule. 2018 WL 3058276 at *10 n.9. Conversely, "a document that is labeled 'notice to appear,' but [that] fails to specify either the time or place of the removal

proceedings" is insufficient to trigger the stop-time rule. *Id.* at *3. Congress intended for the contents of the document, i.e., notice of the time and place and hearing to control, not the title affixed to it. *Id.* at *9 (rejecting the opposite approach as "absurd"). The law eschews "plac[ing] form over substance, and labels over reality." *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *see, e.g.*, *Tokyo Kikai Seisakusho, Ltd. v. TKS (U.S.A.), Inc.*, 529 F.3d 1352, 1360 n.8 (Fed. Cir. 2008) (declining "to exalt form over substance" by limiting an agency's authority "based on how it decided to label its proceedings").

In this case, like many others, the Immigration Court issued and served on both parties a notice of hearing that provided the required notice of the time and place of hearing. This "two-step notice procedure" in which the Department serves a NTA and the Immigration Court serves a notice of hearing that provides written notice of the time and place of hearing, "is permissible" and has been upheld consistently by the circuit courts, including the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit). *Popa v. Holder*, 571 F.3d 890, 895 (9th Cir. 2009) (citing *Gomez-Palacios v. Holder*, 560 F.3d 354, 359 (5th Cir.2009); *Dababneh*, 471 F.3d at 809-10 (7th Cir.2006); and *Haider*, 438 F.3d at 907)); *accord Guamanrrigra*, 670 F.3d at 410. By providing such written notice the Immigration Court fulfilled its responsibility under Department of Justice regulations authorizing the Immigration Courts to "schedul[e] cases and provid[e] notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. § 1003.18(a).[5] These regulations specifically contemplate that "[i]f that information is not contained in the Notice to Appear, the Immigration Court shall be responsible for scheduling the initial removal hearing and providing notice to the government and the alien of the time, place, and date of hearing." 8 C.F.R.

[5] Westlaw, in its "West Codenotes," says 8 C.F.R. § 1003.18 was "held invalid." 2018 WL 3058276 (prefatory material in front of *1). How Westlaw arrived at that supposition is opaque; the majority opinion and concurrence never cite 8 C.F.R. § 1003.18. The dissent cites it twice, without any suggestion that it is no longer valid. *See* 2018 WL 3058276 at *18, *21 (Alito, J.). While Westlaw is a valuable research tool, it is a database, not a source of law.

§ 1003.18(b). That is exactly what happened in this case. To terminate proceedings where the Executive Office for Immigration Review (EOIR) adhered to 8 C.F.R. § 1003.18(b) would render compliance with the regulation an empty gesture and the substance of the regulation a nullity. "[O]nce a regulation is properly issued by the Attorney General, it is the obligation of this Board and the Immigration Judges to enforce it. Regulations promulgated by the Attorney General have the force and effect of law as to this Board and the Immigration Judges." *Matter of L-H-P-*, 27 I&N Dec. 265, 267 (BIA 2018) (quoting *Matter of H-M-V-*, 22 I&N Dec. 256, 261 (BIA 1998)).

Moreover, this two-step process was approved in the context of challenges to *in absentia* orders, *e.g.*, and the Supreme Court found that the same requirements for *in absentia* orders, *see* INA § 240(b)(5)(A) & (C), apply to the stop-time rule. *Pereira*, 2018 WL 3058276 at *11. Under *Pereira* the stop-time rule requires "notice satisfying, at a minimum, the time-and-place criteria defined in § 1229(a)(1)." *Id.* An *in absentia* order likewise requires that "written notice has been provided to the alien or the alien's counsel of record, either through service of a Notice to Appear containing the hearing date and time, or through service of a subsequent Notice of Hearing." *Matter of M-R-A-*, 24 I&N Dec. 665, 670 (BIA 2008) (citing INA § 239(a)(1)-(2)). Circuit court decisions approving of the two-step process of a NTA followed by a notice of hearing to provide the written notice required under INA § 239(a)(1) have arisen in both contexts—*in absentia* orders and the stop-time rule.

"[C]ourts have often recognized that a failure to give a person a required notice can be harmless—e.g., where the person had actual knowledge of the relevant information or the notice defect was cured by a subsequent notice given in time for the person to act on the matter." *Suntec Industries Co., Ltd. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017) (citing cases).[6] In *Popa*

[6] *Suntec* involved an administrative order by the Department of Commerce, which the court upheld. 859 F.3d at 1365. Although the request to initiate "anti-dumping" proceedings was not properly served on Suntec, when Commerce

the Ninth Circuit held that a "Notice to Appear that fails to include the date and time of an alien's deportation hearing, but that states that a date and time will be set later, is not defective so long as a notice of hearing is in fact later sent to that alien." 571 F.3d at 896 (upholding the denial of a motion to reopen following an *in absentia* order). The Eighth Circuit put it more emphatically: "Our reading of the INA and the regulations compels the conclusion that the NTA and the NOH [notice of hearing], which were properly served on Haider, combined to provide the requisite notice." 438 F.3d at 907 (same). The court elaborated:

> The NTA initiated removal proceedings against Haider and informed him that an NOH would be mailed to the address listed on the NTA. . . . As promised, the Immigration Court later mailed the NOH containing the date and time of the hearing to Haider. We see nothing unlawful about this conduct. Indeed, the regulations reasonably authorize the Immigration Court to set the date and time of its own hearings and provide due notice to the alien. . . .
>
> We wish to be clear that the NTA, if it were the only notice served on Haider in this case, would not have authorized *in absentia* removal because Haider would not have been served notice of the date and time of the hearing as required by § 1229(a)(1).

Id. at 907-08. The Notice to Appear was not statutorily defective because "the NTA and the hearing notice combined provided [the respondent] with the time and place of her hearing, as required by 8 U.S.C. § 1229(a)(1)(G)(i)." *Popa*, 571 F.3d at 896. *Peirera* does not overturn or abrogate the holdings in *Popa* and *Haider*, but rather is consistent with them.

Finally, over two years ago the Third Circuit held that this two-step procedure is required to trigger the stop-time rule. *Orozco-Velasquez v. Att'y Gen. of the U.S.*, 817 F.3d 78 (3d Cir. 2016). As that court explained, "the government did not comply with § 1229(a)(1)'s directive until April 2010, when it served Orozco-Velasquez with a NTA correcting the address of the

---

initiated its review it published notice in Federal Register. *See id.* at 1364-65. The court explained that the "crucial fact . . . is that there was an intervening event between" the request and the proceedings themselves, i.e. that the agency conducting the proceedings provided legally sufficient notice. *Id.* at 1368.

Immigration Court and a Notice of Hearing establishing the date and time of removal proceedings." *Id.* at 83. *Pereira* reached the same holding as *Orozco-Velasquez*. *See* 2018 WL 3058276, at *7 n.4. Just as *Orozco-Velasquez* did not result in the termination of proceedings, neither does *Pereira*.

CONCLUSION

The respondent's reading of Pereira is erroneous as a matter of law, and his request to terminate proceedings should be denied. The Board should deny the instant motion and proceed to consider any other issue(s) on appeal.

Respectfully submitted on this ~~12th~~ 16TH day of July, 2018.

AA FOR

(b)(6)

Joey L. Caccarozzo
Assistant Chief Counsel

Danielle M. Sigmund
Deputy Chief Counsel

Nicole Guzman
Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

2018 JUL 17 AM 9:33

Bermudez-Cota
A(b)(6)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ONE (1) COPY OF THE ATTACHED DEPARTMENT OF HOMELAND SECURITY'S OPPOSITION TO RESPONDENT'S MOTION TO TERMINATE with any attachments was served upon respondent (or his representative) by placing it in a sealed envelope, via either U.S. Postal Service Mail or Inter Office Mail at 6431 S. Country Club Road, Tucson, Arizona 85706, addressed as follows:

The Law Office of Patricia G. Mejia, PC
Selma Taljanovic, Esq.
228 West Elm Street
Tucson, AZ 85705

(b)(6)

7/16/18
Date

Ronald Johnson
Legal Assistant

2018 JUL 17 AM 8:33
IMMIGRATION COURT
OFFICE OF THE CLERK